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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-858

THOMAS RICCI, PETITIONER

v.

CHICAGO MERCANTILE EXCHANGE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

STATEMENT

Petitioner seeks review of a decision of the court of appeals holding that certain issues in petitioner's private treble damage antitrust action must, under the doctrine of primary jurisdiction, first be considered by the Commodity Exchange Commission or the Secretary of Agriculture.

Petitioner brought this suit against the Chicago Mercantile Exchange, three of its officers, Siegel Trad-

ing Co., a member firm of the Exchange, and the president of Siegel Trading (all respondents herein) to recover damages petitioner allegedly suffered from cancellation of his membership and trading privileges in the Exchange. The complaint alleged that respondents had violated Section 1 of the Sherman Act [1] by conspiring to prevent petitioner from maintaining his membership in the Exchange and had transferred his membership in violation of the rules of the Exchange (App. 5-20).[2] Specifically, it alleged that Siegel induced the Exchange to transfer petitioner's membership to a third party by use of a blank authorization to transfer membership that petitioner had executed but subsequently had revoked.[3] The transfer allegedly took place without notice and hearing, and without consideration of petitioner's claim, known to the Exchange, that a debt he owed to Siegel was more than offset by a debt owed by Siegel to petitioner. As a result, petitioner alleged, he was unable to conduct his business until he purchased a new membership in the Exchange.

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[1] The complaint also alleged tortious interference with advantageous commercial relationships in violation of state law.

[2] "App." refers to the appendix in the court of appeals.

[3] Exchange Rule 307 states that a membership can be transferred or sold only when the member signs an authorization to transfer. If the transfer of petitioner's membership was invalid, then he was also improperly denied trading privileges on the Exchange in violation of Rule 322. Paragraph 10 of the complaint sets forth the rules of the Exchange involved here (App. 7-9). The rules have been recently renumbered, but there do not appear to have been any substantial changes.

The district court dismissed the complaint for failure to state a cause of action under Section 1 of the Sherman Act (Pet. App. 4a). The court of appeals reversed, holding that "absent any justification from the Exchange's status as a board of trade and a designated 'contract market,' the complaint is sufficient to allege a group boycott, a *per se* violation of section 1 of the Sherman Act." (Pet. App. 10a).

The court held, however, with one dissent, that under the doctrine of primary jurisdiction the antitrust proceedings should be stayed until the Commodity Exchange Commission or the Secretary of Agriculture passed on the validity of the defendants' conduct under the rules of the Exchange and the Commodity Exchange Act, 7 U.S.C. 1, *et seq.* (Pet. App. 10a-18a). The majority found that the facts alleged in the complaint in support of the antitrust charge also constituted violations of Exchange rules which could be investigated by the Commission or the Secretary of Agriculture (Pet. App. 14a).

The dissent noted that although the Commission and the Secretary could determine whether there had been violations of the Exchange rules, they had no jurisdiction to decide antitrust issues. It also stated that the district court was just as competent as they were to resolve the factual question involved in the antitrust complaint (Pet. App. 18a-25a).

INTEREST OF THE UNITED STATES

This case raises an important question concerning the proper scope of the doctrine of primary jurisdiction in antitrust cases. Because of its responsibility

for the enforcement of the antitrust laws, the United States is interested in maintaining the proper division of responsibility between regulatory agencies and the federal courts in the antitrust area.

The issue presented here is important with respect to the application of the antitrust laws both to commodities trading and to other industries subject to less than comprehensive regulation by administrative agencies. In 1971, there were almost 12 million commodity futures transactions involving an estimated $123.7 billion.[4] These transactions form an essential part of the nation's distribution system of agricultural products. Moreover, there are a number of cases pending in the lower federal courts, including one filed by the United States, in which antitrust claims have been raised concerning practices in the commodities trading industry.[5]

DISCUSSION

The antitrust laws are the primary vehicle for promoting a free market economy and regulating practices which restrain competition. Congress also has enacted numerous statutes granting varying degrees of authority to administrative agencies to regulate certain practices in the public interest. When an anti-

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[4] U.S. Department of Agriculture, Release No. 4297-71, December 29, 1971.

[5] These cases include *United States* v. *Board of Trade of City of Chicago* (N.D. Ill., No. 71 C 2875); *Arenson* v. *Chicago Mercantile Exchange* (N.D. Ill., No. 71 C 854); *Arenson* v. *Board of Trade of the City of Chicago* (N.D. Ill., No. 71 C 855).

trust suit challenges activities which are subject to the regulatory authority of an agency, the question often arises whether the district court or the agency has primary jurisdiction over the issues involved. Under principles established by this Court, the district courts should defer to regulatory agencies in antitrust cases only where Congress has given the agency such comprehensive regulatory authority, including either the power to grant exemptions from the antitrust laws or the power to remedy antitrust violations, that it may be deemed to that extent to have supplanted the normal operation of the antitrust laws.

The decision below is at variance with these principles. The court below held that the Commodity Exchange Commission and the Secretary of Agriculture must be given an opportunity to determine whether the facts alleged in petitioner's complaint established violations of the Commodity Exchange Act or the rules of the Chicago Mercantile Exchange, before the district court could consider petitioner's antitrust contentions. This holding failed to focus on the critical question—whether the Act provides a sufficiently comprehensive regulatory scheme to warrant application of the doctrine of primary jurisdiction.

1. The doctrine of primary jurisdiction "requires judicial abstention in cases where protection of the integrity of a regulatory scheme dictates preliminary resort to the agency which administers the scheme" (*United States* v. *Philadelphia National Bank*, 374 U.S. 321, 353). The doctrine originated in railroad rate cases, where an initial judicial determination of the reasonableness of a particular rate would have

interfered with the statutory scheme under which the Interstate Commerce Commission had been given specific authority to determine the question. *Texas & Pacific R. Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426; see, also, *United States* v. *Western Pacific R.*, 352 U.S. 59. In the antitrust field, however, the doctrine has been applied only where there is a comprehensive regulatory scheme under which the administrative agency is authorized to decide the issues involved in the antitrust suit and application of the antitrust laws might frustrate Congress' intent to substitute pervasive agency regulation for the operation of free market forces. See *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 351-354; *United States* v. *Radio Corp. of America*, 358 U.S. 334, 346-350. The application of the doctrine of primary jurisdiction in antitrust cases is thus limited "lest the antitrust policy whose enforcement Congress in this situation has entrusted to the courts is in practical effect taken over by * * * [the regulatory] agencies" (*California* v. *Federal Power Commission*, 369 U.S. 482, 490).

These decisions also show that, contrary to the thinking of the court of appeals in this case, the doctrine is not to be applied merely because the facts involved in an antitrust suit also relate to issues that are subject to a regulatory agency's jurisdiction. The critical question is not whether the agency has jurisdiction to deal with some of the problems posed by the facts in the antitrust case, but whether the agency's regulatory authority is so comprehensive that permitting the district court to decide the antitrust case would create a serious possibility of con-

flict with the proper exercise of the agency's function in administering the regulatory scheme that Congress directed it to apply.

2. There is neither a sufficiently comprehensive regulatory scheme involved in this case nor a sufficient possibility of conflict between that scheme and the antitrust suit to justify the staying of the district court proceeding until the agencies involved have had the opportunity to consider the matter. The statute involved, the Commodities Exchange Act, does not provide a pervasive regulatory scheme for the commodities trading business but rather was designed narrowly to deal with specific evils. In enacting that statute, Congress noted the large volume and economic importance of commodity transactions and found that such transactions are susceptible to speculation, manipulation, and control, with sudden or unreasonable fluctuations in the prices of commodities on boards of trade frequently occurring as a result. 7 U.S.C. 5. Accordingly, Congress decided to provide limited regulation to protect the national interest in commodity transactions (*ibid.*). See *Chicago Board of Trade* v. *Olsen*, 262 U.S. 1.

To qualify under the Act to engage in the trading of commodity futures, a board of trade must register as a "contract market" with the Secretary of Agriculture, must file required reports with the Secretary and must provide rules "for the prevention of manipulation of prices and the cornering of any commodity by the dealers or operators" on the market. 7 U.S.C. 7(d). The Secretary has authority to disapprove a rule adopted by a board of trade, but such authority is

limited to instances where the rule violates the Commodity Exchange Act or any rule, regulation or order promulgated thereunder. 7 U.S.C. 12a(7). The Act specifically prohibits certain types of practices, deemed adverse to the public interest. 7 U.S.C. 6b, 6c. In addition, commodity brokers are required to register with the Secretary and to maintain minimum capital requirements; the Secretary can suspend or revoke the registration of a broker who violates the Act or any rules of the Secretary. 7 U.S.C. 6f(2).

The Act also creates the Commodity Exchange Commission, which consists of the Secretary of Agriculture, the Secretary of Commerce, and the Attorney General (or their representatives). 7 U.S.C. 2. The Commission is authorized to administer and enforce certain of the standards embodied in the Act (see, *e.g.*, 17 C.F.R. 1.20-1.39), and may conduct disciplinary proceedings for violations of the Act or of rules and regulations promulgated thereunder. 17 C.F.R. 0.50-0.96.

The scheme that Congress provided in the Commodities Exchange Act is not the kind of comprehensive regulatory system that would make it appropriate for the courts in antitrust cases to defer to the expert judgment of either the Commission or the Secretary of Agriculture. Neither the Commission nor the Secretary has any general authority to proceed against unfair methods of competition or otherwise to grant relief against antitrust violations; they have no authority to determine who can do business in the commodities markets, the prices to be charged, or the establishment of new markets. Their jurisdiction is

limited to dealing with the precise trading practices specified in the Act; that is the only area in which they have experience or expertise. In contrast, "the courts of the United States have over the years become the repository of antitrust expertise" (*Thill Securities Corp.* v. *New York Stock Exchange*, 433 F. 2d 264, 273 (C.A. 7), certiorari denied, 401 U.S. 994.

The only issues either the Commission or the Secretary could decide in this case is whether respondents violated the Act or the rules of the Exchange; by definition, that is the only issue over which the Commission has jurisdiction. The issues in the antitrust case, however, are much broader; the complaint alleges that respondents conspired to deprive petitioner of a membership and trading privileges. Neither the Secretary nor the Commission has authority to decide that issue, or to grant effective relief against it. Cf. *Pan American World Airways* v. *United States*, 371 U.S. 296.*

The present case is, therefore, similar to *Georgia* v. *Pennsylvania R. Co.*, 324 U.S. 439, where the Court held that a complaint charging a conspiracy among railroads to fix rates alleged a violation of the antitrust laws cognizable in the federal courts without the need for prior resort to the Interstate Commerce Commission. The Court reasoned that even

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* Compare *Denver Union Stockyard Co.* v. *Denver Live Stock Commission Co.*, 404 F. 2d 1055 (C.A. 10), certiorari denied, 394 U.S. 1014, where the court held that the Secretary of Agriculture did not have primary jurisdiction under the Packers and Stockyards Act to consider an antitrust complaint alleging monopolization of the stockyard business in Denver and challenging a merger of two stockyard firms.

though the Commission had primary jurisdiction to determine the reasonableness of rates, it had no authority to immunize or prohibit combinations of competitors fixing rates.

The present case is unlike *Silver* v. *New York Stock Exchange*, 373 U.S. 341, which involved the question whether the regulatory scheme of the Securities Exchange Act of 1934 created an exemption from the antitrust laws for certain actions taken by a stock exchange.[7] Here the regulation of futures trading on the commodity markets is focused so specifically on the mechanics of such trading that there is no basis for implying an antitrust exemption for that business. Moreover, *Silver* makes it clear that it is for the courts rather than an administrative agency to make any necessary reconciliation between the regulatory scheme and the antitrust laws and to determine the extent, if any, of implied repeal of those laws. The decision below therefore cannot be justified on the

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[7] In *Silver*, this Court considered whether the duty of self-regulation imposed upon a stock exchange by the Securities Exchange Act implied an exemption from the antitrust laws with respect to the arbitrary denial by a stock exchange of direct wire telephone connections between its members and two non-member broker-dealers to whose business such connections were essential. The Court held that "[r]epeal [of the antitrust laws] is to be regarded as implied only if necessary to make the Securities Exchange Act work, and even then only to the minimum extent necessary." 373 U.S. at 357. Applying this test, the Court ruled that "particular instances of exchange self-regulation which fall within the scope and purposes of the Securities Exchange Act may be regarded as justified in answer to the assertion of an antitrust claim," but that the arbitrary act of self-regulation involved was not so justified. 373 U.S. at 361.

ground that the Secretary or the Commission should determine in the first instance the scope of any possible antitrust immunity.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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